Supreme Court, U.S.
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No.

IN THE SUPREME COURT OF THE UNITED STATES

JEFFREY J. THOMPKINS,

Petitioner,

v.

LIL' JOE RECORDS, INC., LIL' JOE WEIN MUSIC, INC., JOSEPH WEINBERGER,and JOHN DOE INDIVIDUALS AND CORPORATIONS 1-5,

Respondents.

On Petition for a Writ of Certiorari To The United States Court of Appeals For The Eleventh Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

The Eleventh Circuit affirmed the district court's decision holding that a record company (as a debtor in possession) could reject executory contracts with a music recording artist, but somehow retain possession and ownership of the Copyrights from the rejected executory contracts, and then transfer or sell those Copyright assets to a third party free of any obligation post-bankruptcy for the third party to pay the artist who created the works and Copyrights. The Eleventh Circuit's decision allows a record company to do in bankruptcy what it could never do outside of bankruptcy; a) reject or repudiate its obligation to pay an artist who created the works or Copyrights the record company is exploiting, and b) continue to profit from those works and Copyrights without a Court of law severing the record company's ownership in those Copyrights and works. *See Hustlers, Inc. v. Thomasson*, 307 F. Supp. 2d 137 (N.D. Ga. 2004). The Eleventh Circuit's decision directly conflicts with published decisions in the Second, Third and Ninth Circuits holding the exact opposite of the decision generating this petition.

The questions presented are:

A. Is there an equitable lien placed upon a Copyright in law, such that if a debtor in possession or bankruptcy trustee transfers the Copyright to a third party, that transfer is subject to the ongoing obligation, post-bankruptcy, to compensate the artist (or his/her/its assignee) whose efforts and genius created the intellectual property works upon which the Copyright was obtained from the artist pre-bankruptcy, preventing a record company or its bankruptcy representatives from severing the artist's right to be compensated for his/her/its works and Copyrights in bankruptcy?

B. Is there a statutory condition precedent that requires a debtor in possession to first assume a contract under 11 U.S.C. § 365 involving intellectual property such as Copyrights and licenses, before the debtor or its trustee can thereafter transfer, sell or assign intellectual property assets such as Copyrights or licenses from an executory contract, as held by the Courts in the 9th, 2nd and 3rd Circuits? The Eleventh Circuit's Opinion in the Court below conflicts with the law of these Circuits, and establishes a rule of law whereby record companies are now able to forum shop bankruptcies, and wash the Copyrights transferred from recording artists of the ongoing obligation to pay the artists royalties for the sound recording copyrights and music composition copyrights; by simply declaring bankruptcy, rejecting the executory contracts, and then transfer the Copyrights-sans the obligation to pay the artists who created the works and Copyrights a penny, post-bankruptcy.

LIST OF PARTIES

The parties in the caption are the parties to this case.

CORPORATE DISCLOSURE STATEMENT

The defendant/respondent corporations in the caption of this petition are solely owned by respondent Joseph Weinberger. Navarre Corporation was listed by the Eleventh Circuit as a Third Party Defendant-Appellee, but Navarre has never been named or sought to be added as a defendant to any lawsuit filed by petitioner Thompkins.

Nautilus Insurance Company is the insurer for the respondents, and it is a wholly owned subsidiary of the W.R. Berkley Company, a publicly traded insurance holding company, and it is a Fortune 500 Company listed on the New York Stock Exchange under the stock trading symbol BER. This statement is provided as required by Rule 29.6.

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OPINION BELOW

The initial opinion of the United States Court of Appeals for the Eleventh Circuit is reported at *Thompkins v. Lil' Joe Records, Inc.*, 476 F.3d 1294 (11th Cir. 2007). The Eleventh Circuit denied petitioner's request for rehearing en banc on April 27, 2007. The Eleventh Circuit's decision affirms the District Court's Order rejecting the Magistrate Court's Report and Recommendation, and the District Court issued its own Order granting respondents' motion for summary judgment and rejecting petitioner's motion for summary judgment on December 7, 2004. The District Court decision was not reported. *See* Appendices A-D.

STATEMENT OF JURISDICTION

This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL & STATUTORY PROVISIONS INVOLVED

Title 11 United States Code, Section 363.

Use, sale, or lease of property.

***

(b)(1) The trustee, after notice and a hearing, may use, sell, or lease, other than in the ordinary course of business, **property of the estate**, except that if the debtor in connection with offering a product or a service discloses to an individual a policy prohibiting the transfer of personally identifiable information about individuals to persons that are not affiliated

with the debtor and if such policy is in effect on the date of the commencement of the case, then the trustee may not sell or lease personally identifiable information to any person unless--

(Bolded Emphasis Supplied By Petitioner).

Title 11 United States Code, Section 365.

Executory contracts and unexpired leases.

***

(g) Except as provided in subsections (h)(2) and (i)(2) of this section, **the rejection of an executory contract** or unexpired lease **of the debtor constitutes a breach of such contract** or lease–

(1) if such contract or lease **has not been assumed** under this section or under a plan confirmed under chapter 9, 11, 12, or 13 of this title, **immediately before the date of the filing of the petition;**

(Bolded Emphasis Supplied by Petitioner).

The remainder of these two statutes are included in their entirety in the appendices, as required.

STATEMENT OF THE CASE

In 1989 Thompkins, while still a minor, signed a recording contract with the predecessor of Luke Records, in exchange for its obligation to pay him royalties for the sales of his sound recordings in the future. Thompkins fully performed his obligations under this contract, delivered three

full length albums, and the contract expired by its own terms in 1994 prior to the bankruptcy in this matter. *See* Appendix E.

Attached as Appendix F is a 1992 Addendum the respondents contend supports their position that Thompkins gave up half his rights to the music composition Copyrights, and that he later gave the other half up in return for a promise to be paid royalties for the music he wrote in dispute in this matter.

Both of these contracts transfer Copyrights, but subject to the ongoing obligation to pay Thompkins royalties from the exploitation of the works as required by the Copyright Act.

In 1994 Luke Records was hit with a sizable judgment for its failure to pay royalties to another Luke Records artist, Peter Jones, and Weinberger, its then CEO/General Counsel, was fired. Shortly thereafter some of Luke's creditors were allegedly provided information by Weinberger and an involuntary petition for bankruptcy was filed, which was subsequently converted to a Ch. 7 liquidation.

On February 16, 1996 a plan of reorganization was filed that included a Letter of Intent, whereby Weinberger was to purchase the debtors' assets and he was given sole discretion to direct Luke Records's estate to accept or reject various executory contracts, including Thompkins's. A stated "material provision" of the joint plan of reorganization was the assumption of the executory agreements, and assignment to Weinberger. The only alternative to this plan, as stated in the plan, was to "vigorously" prosecute preference claims against Jones arising out of partial

collection of his judgment, and fraud and or preference claims of approximately $300,000 under 11 U.S.C. §§ 548 & 547 of the Bankruptcy Code "against Weinberger."

However, on the eve of the plan being approved Weinberger's counsel instructed the debtor in possession that Weinberger no longer wanted to assume the executory contracts. Weinberger testified in his deposition that his reason for withdrawing his request was his being told by his counsel he could completely avoid paying the artists post-bankruptcy by rejecting the contracts, and buying the assets from the estate, post rejection.

Following the direction of Weinberger granted to Weinberger under the plan, the debtor in possession for Luke Records withdrew its intent to assume the Thompkins and other executory contracts on March 21, 1996, and rejected the contracts as executory.

The Court set a bar date for the parties including Thompkins to file their claims for breach of contract under 11 U.S.C. § 365(g), due to the rejection of the contracts at Weinberger's direction.

On April 8, 1996 the debtor in possession for Luke Records executed a quit claim deed to Weinberger for any assets that Luke Records retained after the rejection. "Portion Conveyed: 100% worldwide rights or whatever right title and interest the Assignor has, **if any**, to the master recordings as hereinafter defined." (Bolded & Underlined Emphasis Supplied).

Respondents and including their owner Weinberger contend that Luke Records could reject intellectual property involving works and copyrights as executory contracts under

11 U.S.C. § 365, scrub them clean of any obligation to pay post-bankuptcy royalties, and that he is entitled to exploit the works and copyrights post-bankruptcy without any obligation to pay Thompkins or any other artist whose efforts created the works.

According to the terms of the plan of reorganization, Weinberger testifies that the deal worked out with the liquidating trustees allowed him as a former Luke Records officer to purchase these assets for $350,000 in cash, and promissory notes of approximately $350,000 to be paid from the post-bankruptcy sale of the music. ["All I know is, that I we all met and worked out an agreement for me the [sic to] purchase it, and that was the price agreed to."]. This plan also involved looking past an approximately $300,000 preference or fraud claim against Weinberger identified by the Luke Records bankruptcy estate examiner.

Weinberger testifies that the assets he purchased have generated approximately $10 to $20 million in revenue to him as of September 2003, and respondent contends a significant portion involves music Thompkins either personally performed or compositions he wrote or co-authored, and performed by other acts including the 2LiveCrew. This post-bankruptcy exploitation of Copyrights has not resulted in one penny of payment to the artists who created the works, including Thompkins, all of whom honored their contracts, and who did nothing to shed their obligations to Luke Records pre or post-bankruptcy.

REASONS FOR ALLOWANCE OF THE WRIT

This decision creates a rule of law that subjects every artist who has ever recorded music–whether they be Sinatra, The Boston Pops or Springsteen–and transferred their music

and Copyrights to a record company, in exchange for royalties under the Copyright Act and pursuant to contract, at peril of having their future rights to royalties stripped away in bankruptcy, by the record company rejecting the contracts as executory and then transferring the Copyrights to a third party free of the royalty obligation.

It does not take a furtive mind to envision how the Eleventh Circuit's decision can be misused to deprive artists of their right to royalties, and no debtor will ever affirm an executory contract involving Copyrights or intellectual property, because under *Thompkins, supra*, it may avoid the post-bankruptcy obligation of paying the artists by rejecting the contract. This published decision has sparked a plethora of articles in Copyright and Bankruptcy publications, and simply "googling" the terms "rejection executory contracts copyrights" shows but a sample of that debate.

The law of Copyright and contracts in the Eleventh Circuit and elsewhere is that if a transferee/assignee of Copyrights repudiates its obligation to pay the transferor who created the works and Copyrights, then the contract can be rescinded and the works and Copyrights revert to the artist. *Hustlers*, 307 F. Supp. 2d at 1381[6], *citing*, *Nolan v. Sam Fox Pub. Co., Inc.*, 499 F.2d 1394, 1397 (2nd Cir. 1974). In *Hustlers, supra*, that company faithfully paid royalties to the artist for more than 30 years after a transfer of Copyrights and works in the 1970s, yet the Court allowed the artist to rescind the contract when Hustlers withheld payments when a dispute between the two parties erupted over other funds owed and due Hustlers.

Weinberger in this case has testified it was his goal to avoid the obligation to pay Thompkins post-bankruptcy, and that to effectuate this plan he first ordered the rejection of the

executory contracts under 11 U.S.C. § 365, and then bought whatever interest the Luke Records bankruptcy estate had left under 11 U.S.C. § 363(b)(1) is how he planned to avoid the obligation to pay the artists who created the works.

Petitioner respectfully asserts that the law does not allow him to use bankruptcy as an artifice to intentionally avoid and deprive an artist of royalties from Copyrights, something that Weinberger absolutely could not do in a non-bankruptcy setting. *Hustlers, supra; Nolan, supra.*

Creative genius drives this economy, and to establish a rule of law that changes the impetus to create works and deprive those who create works and Copyrights runs contra to the basic purposes of the Copyright Clause in the 1st Amendment, the Copyright Act, and allows bankruptcy rules to trump an artist's right to be compensated for work.

A. The Artist's Royalty Obligation as An Equitable Lien Against the Copyrights, and The Bulwark Protecting Artists and Their Right to Compensation for 70 Years

> [T]he **obligation to pay royalties cannot be severed from the ownership of the copyright itself and then destroyed in bankruptcy**. (citation omitted). But that merely means that the copyright owner will always be burdened with the concomitant contractual obligation of paying royalties and cannot shrug it off through bankruptcy proceedings. **To that extent ownership and obligation are inexorably intertwined**, but that does not increase the royalty holders' rights or protections beyond those set forth in the contract. (Bolded Emphasis Supplied).

Yount v. Acuff Rose Music, Inc., 103 F.3d 830, 834 (9th Cir. 1996), *citing, In Re Waterson, Irving, Berlin*, 48 F.2d 704, 710 (2nd Cir. 1931).

The *Waterson, supra*, decision has been the bulwark for protecting artists from the artifice of bankruptcy to excise the obligation to pay royalties for more than 70 years. See *Harris v. Emus Records Corp.*, 734 F.2d 1329 (9th Cir. 1984). The decision in the Eleventh Circuit is the first case to distinguish or state it was "unpersuaded" by the *Yount, supra*, decision, including its internal citation of *Waterson, supra*.

The principle is simple, while a debtor is allowed to reorganize its affairs including selling assets it possesses, it cannot evade the obligation to the artists who created the works or Copyrights in their possession, and any transfer in bankruptcy is subject to that royalty obligation, post-bankruptcy.

Similarly, keyciting that case in Westlaw shows no Court distinguishing the principle in *Waterson, supra*, establishing that you cannot strip a Copyright of the obligation to pay the artist who created it, by washing it through bankruptcy. *Waterson, supra*, has stood the test of time.

Intellectual property holds a special place in the Constitution and law, with a Copyright Act that sets a baseline perimeter of protections for the artist.

> The Constitution's IP clause grants Congress the power "[t]o promote the Progress of Science and useful Arts, by securing for limited Times to Authors and Inventors the exclusive Right to their respective

Writings and Discoveries." U.S. CONST. Art. I, § 8, cl. 8. Accordingly, the IP clause provides Congress with the power to grant a limited monopoly through copyrights or patents to authors or inventors for their particular writings and inventions. *Mazer v. Stein*, 347 U.S. 201, 207-09, 74 S.Ct. 460, 98 L.Ed. 630 (1954). **The IP clause "is intended to motivate the creative activity of authors and inventors by the provision of a special reward, and to allow the public access to the products of their genius after the limited period of the exclusive control has expired."** *Sony Corp. of Am. v. Universal Studios, Inc.*, 464 U.S. 417, 429, 104 S.Ct. 774, 78 L.Ed.2d 574 (1984).

The Constitution grants Congress the power to select, in its judgment, the best policy by which to effectuate the stated purpose of the IP clause. *Graham v. John Deere Co.*, 383 U.S. 1, 6, 86 S.Ct. 684, 15 L.Ed.2d 545 (1966). The court, therefore, defers substantially to Congress for its policy decisions on copyright law. *Eldred*, 537 U.S. at 212, 123 S.Ct. 769. "The courts will not find that Congress has exceeded its powers so long as the means adopted by Congress for achieving a constitutional end are `appropriate' and `plainly adapted' to achieving that end." *Schnapper v. Foley*, 667 F.2d 102, 112 (D.C.Cir.1981) (*citing Mitchell Bros. Film Group v. Cinema Adult Theater*, 604 F.2d 852, 860 (5th Cir.1979)). Further, "[courts] are not at liberty to second-guess congressional determinations and policy judgments of this order, however debatable or arguably unwise they may be." Eldred, 537 U.S. at 208, 123 S.Ct. 769.

Luck Music Library, Inc. v. Ashcroft, 321 F.Supp.2d

107 (D.D.C. 2004).

A standard recording contract, which the 1989 in this case is one, *See Appendix E*, and the composition agreements allowed Luke Records the right as a licensee of Thompkins to copy his master recordings and compositions, in return for a ongoing royalty obligation as contemplated by the Copyright Act. *Luck, supra.*

In *Lubrizol v. Richmond Metal Finisher, Inc.*, 756 F.2d 1043 (4th Cir. 1985), *cert. den.*, 475 U.S. 1057 (1986), the Ninth Circuit held that a debtor licensor could reject an indefinite license agreement as executory, essentially rescind the contract, leaving *Lubrizol* without a license to use the technology post-bankruptcy, despite its virulent protest in the bankruptcy court. Neither Lubrizol or its parent company Texaco set still for this slight, and Congress passed 11 U.S.C. § 365(n) in reaction to this decision to allow licensees the right to elect to continue using certain intellectual property under the same terms negotiated pre-bankruptcy. *See Intellectual Property Licenses in Bankruptcy Act of 1988*, Pub. L. No. 100-505, 102 Stat. 2538 (1988); S.Rep. 100-505 (1988); *See Also, William, Mary Survey: the Treatment of Intellectual Property Interests in Bankruptcy*, 4 J. Bankr. L. & Prac. 391-394, 427-434 (West. Pub. 1995). Under this rationale, Thompkins or any other artist would be better served to file bankruptcy immediately–race Luke Records to the court house, reject their contracts, and at least be afforded the back handed protections of 11 U.S.C. § 365(n). But, 11 U.S.C. § 365(n) only protects licensees, and affords licensors no protection. *See In Re Ricardo E. Brown, Jr.*, 1997 U.S. Dist. Lexis 19211 (E.D. Pa. 1997) [Artist rejected his recording contracts and regained control of all assets and Copyrights, where the record company was refusing to pay].

A transfer of Copyrights to a record company such as Luke Records is in substance and principle a license, because if that record company transferee refuses to pay royalties or repudiate its obligation to the artist outside bankruptcy, the agreement can be rescinded and the artist regains control of his works and Copyrights. *Thomasson, supra; Nolan, supra.* This is the law in the Eleventh Circuit, and it is certainly the law in the Second and Ninth Circuit where the bulk of entertainment and music contracts are written in this great country.

The rules of the game should not change and differ in bankruptcy, allowing a record company or other Copyright transferee to scrub the works and Copyrights of the royalty obligation. The *Waterson, supra*, decision is the law in the Ninth and Second Circuits, and it has protected artists for close to a century.

The Eleventh Circuit decision allows Weinberger to purposefully avoid that royalty obligation, by only taking the good from the executory contracts, the Copyrights themselves, and shed the bad, the royalty obligation. The Eleventh Circuit recognized the equitable lien rule of *Waterson, supra*, but dismissed it saying it was unpersuaded and that Thompkins was afforded a remedy via presentation of a 11 U.S.C. § 365(g) breach of contract claim for damages. *Thompkins*, 476 F.3d at 1311-1313. The problem with this analysis is that it is a hollow remedy and ignores precedent for other Circuits in conflict with that analysis. Thompkins could have hired the best accountants and soothsayers to predict his future royalties, the bankruptcy court could have accepted them on face, but in the end the Luke Records estate was awash in debt and Thompkins still would have received no funds under 11 U.S.C. § 365.

The Eleventh Circuit's decision allows Weinberger to direct a bankruptcy of a company in which he was a former officer, receive its valuable Copyrights and works via a 11 U.S.C. § 363(b)(1) sale, for ***any*** property rights it owned post-rejection, and completely avoid the royalty obligation to the artists post-bankruptcy for the exploitation of the works and Copyrights.

Petitioner respectfully asserts that this principle violates the law in the Eleventh Circuit that an executory contract must be rejected in its entirety, *cum onere*, and you cannot reject a contract as executory in bankruptcy, yet retain the Copyrights. *In Re Beverage Canners Intn'l Corp.*, 255 B.R. 89 (Bankr. S.D. Fla. 2000) ["It is black letter law that an executory contract must either be assumed in its entirety, *cum onere*, or completely rejected."].

The idea behind a rejection of an executory contract is that it is of no benefit, detriment or consequence to the debtor estate. *In Re Gencor Industries, Inc.*, 298 B.R. 902, 909[2,3] (M.D. Fla. 2003) ["Assumption of the agreement will bring the debtor no new assets. Nor will rejection create any new liabilities because the non-bankrupt party already has a claim against the debtor's estate for the debtor's non-performance. Neither rejection nor assumption would benefit the estate. *Id.* (citing Thomas H. Jackson, *The Logic and Limits of Bankruptcy Law,* 107 (1986)). **Rejection of the contract in this context 'is no different from abandoning property of the estate.'** *citing*, In Re *Columbia Gas*, 50 F.3d 233, 239 (3rd Cir. 1995)."]. (Bolded & Underlined Emphasis Supplied).

In this case, Weinberger knew Thompkins's and the other artists' contracts were valuable, value to the estate, and he was willing to assume the contracts and pay for them.

However, at the last minute he ordered their rejection, with the idea to avoid the post-bankruptcy royalty obligation.

Petitioner offers that *Waterson, supra*, is a better rule of law when it comes to Copyrights and intellectual property assets under executory contracts, and as set out below the Ninth and Second and Third Circuits have established a rule of law that assets never become "property" of the estate under 11 U.S.C. § 363(b)(1) and thus they cannot be sold, unless, the debtor first affirms and assumes the executory contracts.

B. The View That Assets From Rejected Executory Contracts Cannot Be Considered "Property" of The Estate Under 11 U.S.C. § 363(b)(1), and The Conflict of The Eleventh Circuit's Decision With Law In The Third, Ninth Circuits

The Ninth and Third Circuits have stated that when licenses, Copyrights, and other intellectual property are involved with executory contracts, then assumption of the executory contracts is a condition precedent of the property becoming assets of the estate, otherwise all the buyer from a bankruptcy estate is buying is an "illusion." *See In Re Access Beyond Technologies, Inc.*, 237 B.R. 32, 47-48 (Bankr. Del. 1999); *See In Re Quintex Entertainment, Inc.*, 950 F.2d 1492, 1495 (9th Cir. 1989); *In Re Tleel*, 876 F.2d 769, 770 (9th Cir. 1989); *In re Public Serv. Co. Of New Hamphsire*, 884 F.2d 11 (1st Cir. 1989).

This rule in these Circuits follows the idea or premise in law that you must either reject or assume the contract in its entirety, *Beverage Canners, supra*; and that you cannot Balkanize an executory contract into sub non-executory

portions (the Copyright transfer) and executory portions (the obligation to pay attached to those Copyrights), as the Eleventh Circuit opinion has done in *Thompkins*. Respondents should not be allowed to take transfer of Copyrights where they directed the Luke Records debtors to reject the executory contracts of Petitioner.

The verbatim language that Petitioner believes is important and controlling to the issue of what happened to the Thompkins copyrights and works, at the conclusion of the Luke Records bankruptcy can be found at *Access*, 237 B.R. at 47, 48 under the following heading:

> *2. The License Agreement cannot be sold pursuant to § 363*
>
> The Debtors/Trustee seek to avoid this result by asserting that they are not seeking to assume and assign the License Agreement under section 365. Rather, they argue they are "selling" the License Agreement pursuant to section 363. **However, the courts have held that, with respect to an executory contract, until it is assumed under section 365, the debtor has nothing to sell under section 363.** See, e.g., Qintex, 950 F.2d 1492; Tleel, 876 F.2d at 770-71 (treating motion to sell executory contract as motion to assume and assign).
>
> In Qintex, the Court stated:
>
> Section 363 of the Code allows a debtor to sell assets of the estate, after notice and a hearing, including a sale of substantially all the assets of the estate. 11 U.S.C. § 363(b)(1). **An executory contract does not become an asset of the estate until it is assumed**

pursuant to § 365(a) of the Code. See § 365(a); In re Tleel, 876 F.2d 769, 770 (9th Cir.1989) ("**Unless and until rights under an executory contract are timely and affirmatively assumed by the trustee, they do not become property of the debtor's estate**"). Therefore, the sale of Quintex's assets will not include any contract that is executory unless Quintex first assumes the contract. 950 F.2d at 1495.

We agree with the Qintex conclusion. **A debtor cannot avoid the requirements of section 365 by saying it is "selling" a lease or executory contract, rather than assuming and assigning it.**

To hold otherwise would lead to ludicrous results. If the debtor does not assume an executory contract, it is deemed rejected. See, e.g., James Wilson Associates, 965 F.2d at 169; Sea Harvest Corp. v. Riviera Land Co., 868 F.2d 1077, 1079 (9th Cir.1989) (the statutory presumption of rejection, unless the debtor or trustee acts affirmatively to assume a lease, protects the estate from unexpected liability). **Thus, if a debtor does not assume an executory contract before he sells it (as the Debtors/Trustee argue they can here), the buyer may be purchasing an illusion: the executory contract will disappear on conclusion of the bankruptcy case.**

Thus, for the Debtors/Trustee to "sell" the License Agreement to Xircom, they must first assume it under section 365.

(Bolded Emphasis Supplied by Petitioner).

This principle is simply stated, you cannot have your cake and eat it too. If you want to buy Copyright, license or similar intellectual property assets from a debtor possessing them under an executory contract, the debtor must first assume the contracts and then sell them to you, otherwise the assets never become "property" of the debtor estate under 11 U.S.C. § 363(b)(1), and all you are purchasing is an illusion if the debtor rejects the contracts and attempts to sell them to you. *Id.* This rule of law honors the idea of finality for bankruptcy sales, the *cum onere* priniciple of either rejecting or accepting in whole an executory contract, and the Copyright Act's stated goal and purpose of protecting the works and Copyright creator's right to be compensated for his or her efforts, similar to the lien analysis of *Waterson, supra.*

The Thompkins decision from the Eleventh Circuit in this matter cannot be reconciled with the law in *Quintex, supra, In Re Access, and Tleel, supra*, decisions from the Ninth and Third Circuits. The writ in this case should be granted to determine which is the better view in law, and whether there is to be certainty and uniformity in the determination of ownership of Copyrights from rejected executory contracts. Instead of a situation where companies are now going to be seeking the Eleventh Circuit out as a venue to declare bankruptcy, and avoid obligations to their artists by cleansing the Copyrights in bankruptcy.

It appears to some degree that the Eleventh Circuit was scolding Thompkins for having not sought counsel in the Luke Bankruptcy and presented a claim for breach of contract under 11 U.S.C. § 365(g), and thus he missed his remedy. However, again, that is hollow exercise where the debtor is already underwater with no relief in sight, and fortunately where Weinberger rejected the executory

contracts, the assets cannot be sold under the holdings of *Qintex and Access, supra.*

The issues in this matter are important, critical to Thompkins and other similarly situated artists, and particularly where the respondents are now seeking to bury and bankrupt Thompkins with attorneys fee petitions, because he dare seek to be compensated for the exploitation of works and Copyrights he created.

CONCLUSION

For the foregoing reasons, petitioner respectfully requests that the Supreme Court grant review of this matter.

Respectfully submitted,

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